

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHRISTOPHER DANIEL FINNEY)	
Claimant)	
)	
VS.)	
)	
FINNS ELECTRIC CO. INC.)	
Respondent)	Docket No. 216,317
)	
AND)	
)	
FEDERATED MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested Appeals Board (Board) review of Administrative Law Judge Nelsonna Potts Barnes' November 26, 2001, Award. The Board heard oral argument on May 10, 2002.

APPEARANCES

The claimant appeared by his attorney, James S. Oswalt of Hutchinson, Kansas. The respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and has adopted the stipulations listed in the Award. Additionally, at oral argument before the Board, the parties agreed that claimant was in need of continuing medical treatment and that Bryan K. Dennett, M.D., would continue as claimant's authorized primary care physician including any referrals. Also, the parties agreed, that as of November 12, 1998, claimant had met maximum medical improvement and all weekly disability compensation payments made by respondent through November 12, 1998, were temporary total disability compensation payments and

all payments made after November 12, 1998, were permanent partial disability payments or permanent total disability payments.

ISSUES

On October 12, 1995, claimant received serious multiple injuries while working for the respondent. As a result of those serious injuries, the Administrative Law Judge (ALJ) found claimant suffered a 90 percent permanent partial disability based on functional impairment and awarded claimant \$100,000, the statutory maximum award, for a permanent partial general disability.¹ The ALJ also ordered respondent to pay certain outstanding medical bills as authorized and to reimburse claimant for certain medical mileage expense.

Claimant appeals and contends the more persuasive evidence contained in the record proves his serious injuries have rendered him permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, the claimant requests the Board to modify the ALJ's Award and enter a permanent total disability award of the \$125,000 statutory maximum. The claimant also requests the Board to order respondent to pay as an authorized medical expense, any maintenance and repairs required on medical equipment or apparatus supplied by the respondent to cure and relieve the effects of claimant's work-related injuries.

In contrast, the respondent requests the Board to affirm the ALJ's Award. Respondent agrees that claimant's serious work-related injuries entitle the claimant to \$100,000 in permanent partial general disability benefits. But respondent argues claimant failed to prove that he is permanently and totally disabled and entitled to a \$125,000 permanent total award. Additionally, respondent contends claimant should be responsible for the maintenance and repairs on medical equipment or apparatus supplied by the respondent for the purpose of curing and relieving the effects of claimant's work-related injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

The facts are not in dispute. On October 12, 1995, claimant suffered serious multiple injuries when he was thrown out of a bucket on a lift of a truck when a cable broke and claimant fell over 25 feet to the ground. At the time of the accident, claimant was co-owner and president of respondent's electric company. Claimant also worked for the

¹ But see K.S.A. 44-510f(a)(4) (1993 Furse) that limits permanent partial general disability awards for functional impairment to \$50,000.

company as a hands-on refrigerator technician and a master electrician. Claimant and his father owned the company and claimant had been working for the company since 1976.

Here, the principal issue is whether claimant sustained a permanent partial general disability² or a permanent total disability³ as the result of the severe disabling injuries he suffered in the October 12, 1995, work-related accident.

The ALJ awarded claimant a 90 percent permanent partial general disability based on permanent functional impairment for a statutory maximum award of \$100,000.⁴ The ALJ denied claimant a permanent total disability award for the statutory maximum of \$125,000.⁵ The ALJ found claimant failed to prove his serious injuries had permanently and totally disabled him from engaging in any substantial and gainful employment. The Board disagrees.

Permanent partial general disability is defined as when the injured worker is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d. The extent of permanent partial disability is expressed as a percentage of an employee's work task loss averaged together with the employee's wage loss, but in no event is the extent of permanent partial general disability less than the percentage of the employee's permanent functional impairment.⁶

Permanent total disability is defined as when the injured worker has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Permanent total disability exists when the worker's injuries result in substantial total paralysis or incurable imbecility or insanity. The combined loss of both eyes, hands, arms, feet or legs, is presumed to constitute permanent total disability when there is no proof to the contrary. In all other cases, permanent total is determined by the facts of each case.⁷ The evidence that establishes an injured worker is "essentially and realistically unemployable" is compatible with the statutory definition of permanent total disability.⁸

² K.S.A. 44-510e(a) (1993 Furse).

³ K.S.A. 44-510c(a)(2) (1993 Furse).

⁴ K.S.A. 44-510f(a)(3) (1993 Furse).

⁵ K.S.A. 44-510f(a)(1) (1993 Furse).

⁶ K.S.A. 44-510e(a) (1993 Furse).

⁷ K.S.A. 44-510c(a)(2) (1993 Furse).

⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App.2d 110, 113, 872 P.2d 299 (1993).

As a result of claimant's October 12, 1995, work accident, claimant suffered multiple injuries including rib fractures, comminuted fractures of the right scapula, right clavicle, fracture dislocation of T9-10 vertebrae, resulting in paraplegia with associated loss of bowel, bladder and sexual function. Those severe injuries required claimant to undergo numerous surgical procedures. The first surgical procedure was decompression and fusion from T6-12, with instrumentation and iliac donor bone graft.

After claimant's initial treatment in Wichita, Kansas, he was transferred to Craig Hospital, located in Englewood, Colorado. Craig Hospital specializes in the treatment of severe spinal injuries. During his stay at the Craig Hospital, complications were noted extending into claimant's cervical spine with progressive loss of sensory function in the right arm and to a lesser extent in the left arm. That condition resulted in an additional surgery at Craig Hospital consisting of a laminectomy and fusion at C4-C6. In the years after his accident, claimant had to undergo other additional surgical procedures of the thoracic spine and a hemorrhoidal surgery caused from his confinement to a wheelchair.

Claimant last testified in this case at the regular hearing held on January 24, 2001. At that time, claimant's authorized primary care physician for his daily medical problems was board certified family practice physician, Bryan K. Dennett, M.D. Dr. Dennett was authorized to monitor claimant's medical condition and needs. Dr. Dennett first saw claimant on September 16, 1999. Since that time, Dr. Dennett has referred claimant to specialists to treat various medical conditions associated with the claimant's severe injuries. Claimant sees a urologist for chronic urinary tract infections; a neurologist for chronic neuropathy and recommendations for medication to control muscle spasticity and chronic pain; a physical therapist for stretching exercises; and a psychiatrist and therapist for treatment of post traumatic stress disorder with a component of depression.

Board certified physical medicine rehabilitation physician, Philip R. Mills, M.D., was authorized to treat claimant in regard to physical rehabilitation and to also make recommendations as to claimant's need for certain assistive devices such as wheelchairs and lifts.

At the regular hearing, claimant continued to suffer chronic pain in his back and neck requiring him to take pain medication daily. He also suffered muscle spasticity in his back and legs which required him to take daily medications. Because of the permanent urinary catheter, claimant experiences urinary infections at an interval of once every two months which causes flu-type symptoms of fever and chills. As a result of the muscle spasticity and the chronic pain, claimant has to get out of his wheelchair and lay down two or three times per day one half to one hour at a time. The various medications claimant is required to take in an attempt to treat his various medical problems are potent and cause drowsiness.

Another problem claimant experiences is involuntary bowel movements. And for the six month period before the regular hearing, claimant testified those involuntary bowel

movements had increased to occurring sometimes daily and probably averaging three times per week. When an involuntary bowel movement occurs, claimant is not aware of it until he smells the odor. He cannot remove his pants and underwear himself in order to clean himself. He has to either call his mother or his wife to come home from work to clean him up.

Claimant's attorney requested orthopedic surgeon, Dr. C. Reiff Brown to perform an independent medical examination of claimant. Dr. Brown saw claimant on two occasions, November 12, 1998 and May 10, 2000. Dr. Brown had for his review various medical treatment records of claimant. He took a history from claimant and performed a physical examination of claimant. Dr. Brown found claimant totally paraplegic from the waist down. Additionally, Dr. Brown found claimant had severe weakness and loss of sensation in his right upper extremity. Claimant had severe pain in his low thoracic and lumbar spinal area as well as his right hip, right shoulder and right clavicle. Claimant also had ongoing bowel, bladder and sexual dysfunction. Dr. Brown opined that all of those injuries and residuals were the result of claimant's work-related October 12, 1995, accident.

Dr. Brown concluded that the prognosis was poor that claimant would ever recover from his many injuries and residual medical problems. Based on the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (3rd ed. rev.), Dr. Brown opined that claimant's permanent functional impairment was somewhere around 90 percent. As of the November 12, 1998, examination, Dr. Brown opined that claimant had reached maximum medical improvement for treatment of his neurological and orthopedic problems. Dr. Brown also concluded that claimant would always have continuing medical problems requiring treatment because of the nature of his injuries.

Dr. Brown reviewed a list of work tasks claimant had performed in the 15 years preceding his work-related accident compiled by vocational expert, Karen Terrill. Dr. Brown agreed there were certain work tasks on the list which only required claimant to sit and use his hands and voice. Those work tasks, if isolated, Dr. Brown opined claimant could perform. But Dr. Brown went on to opine that claimant only had the ability to perform those sedentary tasks in an isolated environment not taking into consideration claimant's requirement to get to his place of employment and then retain the ability to remain in the place of employment. Dr. Brown opined that claimant could not stay in a place of employment for a continuous eight-hour day unless he was at home but even then, Dr. Brown did not think claimant could perform sedentary work activity for eight hours per day.

Moreover, Dr. Brown indicated that claimant could not stay in his work place for more than four hours without taking time to lay down and stretch. Other problems claimant would have performing sedentary work would be his muscle spasticity and the analgesic medications claimant is required to take for pain would affect his concentration. Because of claimant's urinary tract infections, claimant would miss work anywhere from seven to ten days during some months and then during other months he would not have the problem. Dr. Brown was asked, based on a reasonable degree of medical probability, whether

claimant was completely and totally disabled from any type of gainful employment as a result of his October 12, 1995, accident. Dr. Brown replied, "From a practical standpoint, I don't believe he's employable."⁹

Vocational expert, Karen Terrill, interviewed claimant on two occasions, March 23, 1999, and April 19, 2000, at the request of claimant's attorney. Ms. Terrill was requested to determine whether claimant possessed the ability to obtain any substantial and gainful employment in the open labor market. She also was requested to develop a list of work tasks claimant had performed in the 15 years preceding his October 12, 1995, accident. Ms. Terrill agreed the claimant possessed the educational background and experience to perform some sedentary type of jobs in the open labor market. But she went on to opine that claimant was realistically not employable in the open labor market. She based her opinion on the fact that claimant was required to lie down for up to one half to one hour during the day, he was required to take various medications that affected his concentration, he would be absent from work at least two days per month because of other medical problems such as urinary tract infections, and the work environment had to be handicapped accessible in order for claimant to be employed.¹⁰

The Board concludes, based on claimant's testimony and the opinions expressed by both Dr. Brown and Ms. Terrill, that the greater weight of the persuasive evidence contained in the record proves claimant is permanently and totally disabled from performing any substantial and gainful employment in the open labor market. The Board is mindful that Dr. Dennett opined that *it was possible* for claimant to perform some sedentary work but because of his paraplegia he would miss several days of work per month. Dr. Mills also opined that claimant could perform 8 sedentary job tasks of the 37 job tasks that claimant had performed before his accident. But the Board concludes those two physicians' opinions, in light of the other more persuasive evidence contained in the record, do not overcome the presumption that claimant is permanently and totally disabled as the result of the loss of use of both of his legs.¹¹

The only other issue on appeal is whether the respondent should be responsible for the maintenance and repair of apparatus and equipment supplied to the claimant to cure and relieve the effects of his injuries. At the December 2, 1997, preliminary hearing, claimant requested the ALJ to order respondent to pay for certain maintenance and repairs needed on handicapped equipment supplied by respondent for claimant's house and van. In a December 5, 1997, preliminary hearing order, the ALJ denied claimant's request. The ALJ did not address this issue in the Award. But the claimant raised the issue consistently

⁹ Brown Depo. at 26-27.

¹⁰ Terrill Depo. at 23.

¹¹ K.S.A. 44-510c(a)(2) (1993 Furse); *Pruter v. Larned State Hospital*, 271 Kan. 865, Syl. ¶ 3, 26 P.3d 666 (2001).

during the litigation of this matter at preliminary hearings and raised the issue in his submission letter before the ALJ. Respondent argued the responsibility of maintaining and repairing this equipment should be claimant's responsibility and not the respondent. The Board concludes respondent does have an ongoing responsibility to maintain, repair and replace any medically necessary equipment or apparatus the respondent supplied to claimant to cure and relieve the effects of the claimant's work-related injury.¹²

The Board affirms and adopts the ALJ's findings and conclusions contained in the Award in regard to the specific past medical expenses and mileage the ALJ ordered respondent to pay as authorized medical expenses.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Nelsonna Potts Barnes' November 26, 2001, Award should be and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Christopher D. Finney, and against the respondent, Finns Electric Co., Inc., and its insurance carrier, Federated Mutual Insurance Company, for an accidental injury sustained on October 12, 1995, and based upon an average weekly wage of \$1,100.

Claimant is entitled to 161 weeks of temporary total disability compensation at the rate of \$326 per week or \$52,486, followed by 222.43 weeks of permanent total disability at the rate of \$326 per week or \$72,512.18, followed by one payment of \$1.82 for a permanent total disability award of \$125,000, which is all due, owing and ordered paid in one lump sum less any amounts previously paid.

Claimant is entitled to necessary future medical treatment reasonably related to his work-related injuries through Dr. Bryan K. Dennett and any referrals Dr. Dennett deems necessary.

Maintenance and repairs of apparatus, appliances or equipment supplied by respondent to claimant reasonably necessary to cure the effects of claimant's injuries are to be provided by the respondent.

Claimant is entitled to the \$500 unauthorized statutory medical allowance.

¹² See *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, Syl. ¶ 2, 999 P.2d 921 (2000) (holding the costs associated with normal wear and tear of a prosthetic device are the responsibility of the employer and its insurance carrier).

Respondent is ordered to pay all reasonable and necessary medical expenses for the treatment of claimant's October 12, 1995, multiple injuries as authorized medical.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation